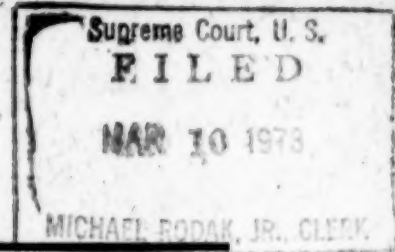


No. 77-936



In the Supreme Court of the United States

OCTOBER TERM, 1977

COASTAL STATES PETROCHEMICAL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

**WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-936

COASTAL STATES PETROCHEMICAL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

Petitioner seeks review of the Court of Claims' decision that a particular contract for jet fuel was an "indefinite quantities" contract rather than a "requirements" contract. There is no reason for this Court to review the decision, which turns on the details of the offer, the bids, and the contract.

1. JP-4 is a volatile mixture used for military jet fuel. The fuel is procured every six months in such large quantity that no single supplier can satisfy the demand (Pet. App. 2a-3a). Invitations for bids usually are sent to 150 or more suppliers. Although fuel often is obtained abroad for foreign use, a combination of increased fuel needs for military flights in Viet Nam and a restriction on the amount of foreign fuel that could be used caused the Department of Defense to solicit more fuel from higher-priced domestic sources.

In February 1969 the United States issued a solicitation to purchase JP-4 fuel for the last six months of that calendar year. The solicitation was one of the semi-annual advertised invitations for bids, and it involved both domestic and foreign needs (Pet. App. 3a-4a). It estimated that non-domestic requirements would be 371,961,000 gallons. Bidders could bid on all or a portion of the requirements. The solicitation predicted, but did not guarantee, particular destinations for the fuel. One part of the solicitation, for example, specified (*id.* at 5a):

Item 365 is a one time procurement in support of Southeast Asia and in implementation of the Balance of Payments Program. The requirements represented by the above are needed at various Pacific bases. The requirements at individual bases are not certain. Accordingly offers are desired on an origin basis only and destination offers for this item will not be considered. *For evaluation purposes only, the destination will be considered to be Guam. * * ** [Emphasis in original.]

The solicitation also stated that foreign-refined fuel would not be considered for purposes of this procurement, although it did not restrict suppliers who were otherwise authorized to supply foreign-refined fuel from doing so, as long as that fuel did not count toward procurements under this solicitation (*ibid.*).

Five other bid solicitations calling for fuel for overseas needs also were issued in February and March 1969. These five solicitations were not subject to a balance of payments restriction or restricted to United States refined products. These five invitations were open to foreign suppliers. Contracts covering 1,396,304,000 gallons were awarded to foreign suppliers (Pet. App. 5a-6a).

Petitioner was awarded a contract to supply an estimated 182,516,000 gallons of JP-4 fuel, 151,200,000 gallons of which were destined for overseas locations (Pet. App. 6a). The contract provided (*id.* at 6a-7a):

(a) The Contractor shall furnish and deliver * * * the supplies and perform the services set forth in the Contract Schedule, for the prices payable according to the terms thereof, in such quantities as may be ordered by the Ordering Officer during the ordering period specified in the Schedule; in consideration therefor, the Government shall order, accept and pay for, on the terms and subject to the conditions set forth herein, supplies or services having an aggregate value at the prices payable under this contract of not less than \$100.00 * * *.

In addition, the contract provided that it could be terminated for convenience of the government, and that the obligation pertained only to orders placed under the contract (*id.* at 7a).

On July 28, 1969, the United States decided to reduce the quantities of JP-4 fuel acquired during the last six months of 1969. The reduction was necessary because of the curtailment of combat activities in Viet Nam. Two days later petitioner was notified of the impending reduction; a month later, petitioner was told (Pet. App. 7a):

* * * the demand for JP-4 to be supplied under your Contract * * * to the Air Force will be reduced from 182,516,000 gallons to 78,728,950 gallons. The Department of the Air Force is being instructed not to place orders in excess of the revised quantity through 31 December 1969 without prior approval of this Center. * * *

Thus, the amount of JP-4 fuel ordered by the United States and delivered by petitioner was only 43 percent of the maximum delivery obligation.

Reductions were computed by a competitive reevaluation (*id.* at 7a-9a). The procurement center assessed costs and quantities of all available fuel, giving petitioner no economic concession for the fact that its fuel would be domestically refined. Because petitioner's price was the highest of all suppliers, it suffered the largest reduction. Petitioner then instituted this action for damages.

2. Petitioner contends that no reasonable businessman would enter into a contract in which the United States could purchase as little as \$100 worth of the product, while the seller would be required to supply as much as \$19,000,000 worth of the product. The Court of Claims correctly rejected this contention, reasoning that the contract should be seen as one for an indefinite quantity because the military's needs were indefinite. We rely on the court's opinion (Pet. App. 10a-20a). The United States purchased from petitioner large quantities of JP-4 fuel, quantities dependent entirely on its needs and limited by petitioner's high price. It acted reasonably, and petitioner is not entitled to damages.

The Court of Claims also properly rejected petitioner's contention that, in effecting reductions, the United States disregarded purchasing restrictions in the solicitation for bids. The court observed that the balance of payments provision covered only 14 percent of the JP-4 fuel to be procured, and that petitioner therefore could not reasonably infer that it would not be competing with foreign-refined JP-4 fuel (Pet. App. 17a). Similarly, the import quota clause, as the court found, merely stated a present intent not to use foreign fuel; the United States

did not promise to refrain from changing plans if a reduction in total purchases made it possible for a greater proportion of total needs to be secured abroad.

Moreover, petitioner's bid price was close to the highest price the United States was willing to pay for JP-4 fuel (Pet. App. 18a). Petitioner must have been aware that the JP-4 fuel to be purchased exceeded normal needs, and, consequently (*ibid.* footnote omitted):

In bidding prices so close to the cut-off point in order to maximize its profit [petitioner] necessarily assumed the risk of misjudging the market and not receiving a contract for all or part of the * * * [quota] on which it bid. * * * [Petitioner's] assertion that it was cut back for no other reason than the fact that the product it was supplying was higher priced than foreign-refined fuel is incorrect. [Petitioner's] fuel was also higher priced than that of all other domestic refiners.[*]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1978.

*Petitioner's contention that the Court of Claims improperly found facts (Pet. 24-29) is incorrect. The Court of Claims (not its trial judges) is charged with the ultimate responsibility of fact finding. Moreover, the facts recited by the court were based on written solicitations and contract provisions, not on disputed issues of personal recollection. Finally, none of the fact finding of which petitioner complains would affect the legal conclusion that this was an indefinite quantities contract or that the reallocation of quantities among suppliers was improper.